GHAZALI MAT GHANI

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[NO: W-05-37-94]
24 FEBRUARY 1998

CRIMINAL PROCEDURE: *Trial - Murder - Trial by jury - Direction to jury, sufficiency of - Whether trial judge failed to give proper direction on culpable homicide not amounting to murder - Whether trial judge misdirected himself - Whether jury misled - Whether accused prejudiced - Penal Code, ss. 299, 300, 302*

The appellant was convicted of an offence of murder following a trial by jury and was sentenced to death. The facts showed that in giving his direction to the jury, the learned Judicial Commissioner had discussed *inter alia* the general statement of the law on what constituted murder and culpable homicide, the respective ingredients of murder and culpable homicide under ss. 300 and 299 respectively of the Penal Code, the evidence that the prosecution had adduced, including the evidence of an eye-witness that the appellant had shot the deceased from close range by using an M-16 rifle, and of the pathologist that death was caused by a fatal shot to the deceased's heart coming from a high velocity rifle, and the prosecution's duty of proving the case beyond reasonable doubt. The learned Judicial Commisioner, in addition, had also posed two questions to the jury, namely, "did the accused cause the injuries to the deceased", and "did the accused have the intention to murder the deceased", before leaving it to the jury to make the necessary findings of fact as to whether: (i) the deceased died as a result of his injuries; (ii) the injuries were as a result of the deceased being shot with the M-16 rifle; and (iii) it was the accused who shot the deceased.

The appellant argued in this appeal that the direction to the jury aforesaid was inadequate and wanting, in that the learned Judicial Commissioner was duty bound but had failed to explain to the jury the full circumstances in which culpable homicide may not amount to murder. According to the appellant, such failure had prejudiced him, as the jury might have been led to believe that, unless he could rely on any of the exceptions in s. 300, he could not otherwise be found guilty of culpable homicide not amounting to murder.

Held:
Per Abu Mansor Ali JCA

[1] There is no merit in the contention that the learned Judicial Commissioner did not fully explain the distinction between s. 300 and s. 299 and that the accused could be guilty of a lesser offence of homicide not amounting to murder. The learned Judicial Commissioner's direction was impeccable and not wanting in any respect.

[1a] There is, in any case, no set of facts favourable to the accused that should weigh on the learned Judicial Commissioner to direct the jury that the accused could be guilty of homicide not amounting to murder or any lesser offence.

[2] From the facts as adduced by the prosecution, it is correct that the accused had inflicted the injury to the deceased's heart causing thereby instantaneous death. The accused's defence that he did not shoot the deceased, and that it was somebody else who did it, justified the learned Judicial Commissioner leaving it to the jury to find the intention of the accused and such intention was to commit murder or nothing else. There is no doubt that the jury gave an answer after having been directed fully and clearly by the learned Judicial Commissioner that the accused did shoot with the required intention to kill, and they unanimously held he committed the murder.

[3] There was no misdirection by the learned Judicial Commissioner. On the evidence, there was only one direction to give to the jury, and it was either murder or nothing else. The jury duly arrived at a verdict that it was murder. The direction to the jury was correct and there was no miscarriage of justice.

[Appeal dismissed; sentence of court below confirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu telah disabit atas kesalahan bunuh ekoran satu perbicaraan di hadapan juri dan telah dijatuhkan hukuman mati. Fakta menunjukkan bahawa sewaktu memberi arahan kepada juri, Pesuruhjaya Kehakiman yang bijaksana telah berbincang, antara lainnya, tentang pandangan umum undang-undang berhubung apa yang membangkitkan perbuatan bunuh dan homisid salah, tentang unsur-unsur dalam kesalahan bunuh dan homisid salah di bawah ss. 299 dan 300 masing-masingnya Kanun Keseksaan, tentang keterangan yang dibuktikan oleh pihak pendakwa, termasuk keterangan seorang saksi pandang bahawa perayu telah menembak si mati dari jarak dekat dengan menggunakan raifel M.16,

dan keterangan ahli patologi bahawa kematian disebabkan oleh tembakan fatal yang datang dari raifel kecepatan tinggi, dan tentang tanggungan pendakwa untuk membuktikan kesnya tanpa keraguan munasabah. Pesuruhjaya Kehakiman yang bijaksana, selain itu, telah juga menanyakan dua soalan kepada juri, iaitu, "adakah tertuduh yang menyebabkan kecederaan kepada si mati" dan "adakah tertuduh mempunyai niat untuk membunuh si mati", sebelum menyerahkan kepada juri untuk membuat rumusan fakta samada: (i) kematian si mati disebabkan oleh kecederaan yang dialaminya; (ii) kecederaan tersebut akibat dari si mati ditembak dengan raifel M.16; dan (iii) perayu adalah orang yang menembak si mati.

Dalam rayuan ini perayu berhujah bahawa arahan kepada juri di atas adalah tidak memadai dan cacat, dalam ertikata Pesuruhjaya Kehakiman adalah bertanggungan tetapi gagal untuk menjelaskan kepada juri sepenuhnya halkeadaan-halkeadaan yang boleh menyebabkan homisid salah tidak menjadi perbuatan bunuh. Menurut perayu, kegagalan sedemikian telah memprejudisnya, kerana pihak juri mungkin telah dipesongkan untuk mempercayai bahawa, perayu tidak boleh didapati bersalah atas kesalahan homisid salah yang bukan membunuh, kecualilah jika beliau boleh bergantung kepada mana-mana pengecualian di bawah s. 300 Kanun Keseksaan.

Diputuskan:
Oleh Abu Mansor Ali HMR

[1] Hujah bahawa Pesuruhjaya Kehakiman yang bijaksana tidak menerangkan sepebuhnya perbezaan di antara s. 300 dan 299, dan bahawa tertuduh boleh mungkin bersalah atas kesalahan homisid salah yang bukan membunuh yang lebih rendah, adalah tidak bermerit.

[1a] Walau bagaimanapun, tidak terdapat satu pun gugusan fakta yang menguntungkan tertuduh yang boleh mendorong Pesuruhjaya kehakiman yang bijaksana untuk mengarah juri bahawa tertuduh mungkin bersalah atas kesalahan homisid salah yang bukan membunuh atau atas mana-mana kesalahan lain yang lebih rendah.

[2] Dari fakta-fakta seperti yang dibuktikan oleh pendakwaan, adalah betul bahawa tertuduh telah mengenakan kecederaan kepada jantung si mati dan menyebabkan kematian yang serta merta. Pembelaan tertuduh bahawa beliau tidak menembak si mati, dan bahawa ianya dilakukan oleh orang lain, mewajarkan Pesuruhjaya Kehakiman menyerahkan kepada juri untuk menentukan niat tertuduh dan bahawa niat tersebut adalah samada untuk membunuh atau langsung tiada apa-apa. Tiada keraguan bahawa juri telah memberi jawapan setelah diberikan arahan penuh dan jelas oleh

Pesuruhjaya Kehakiman bahawa tertuduh sememangnya telah menembak dengan niat untuk membunuh, and mereka memutuskan sebulat suara bahawa tertuduh melakukan pembunuhan tersebut.

[3] Tiada salah arahan di pihak Pesuruhjaya Kehakiman yang bijaksana. Atas keterangan, terdapat hanya satu arahan kepada juri, dan ianya samada perbuatan bunuh atau tiada kesalahan langsung. Juri telah mencapai rumusan sewajarnya bahawa ianya adalah perbuatan bunuh. Arahan kepada juri adalah betul dan tidak berlaku salah laksana keadilan.

[Rayuan ditolak; hukuman mahkamah di bawah disahkan.]

Cases referred to:
Chung Kum Moey v. Public Prosecutor [1967] 1 MLJ 205 ***(dist)***
Tham Kai Yau & Ors v. Public Prosecutor [1977] 1 MLJ 174 ***(dist)***

Legislation referred to:
Penal Code, ss. 299, 300, 302

For the appellant - Collin Sequerah; M/s Zain & Co
For the respondent - Kamaruzaman Abdul Jalil DPP

[Appeal from Criminal Trial No: 45-1-94]

Reported by WA Sharif

JUDGMENT

Abu Mansor Ali JCA:

The appellant was charged before the learned Judicial Commissioner (as he then was) Tuan Hakim Hashim bin Dato' Haji Yusoff sitting with a jury on 19 September 1994 as follows:

> Bahawa kamu, pada 26.12.1992 jam lebih kurang 12.05 tengah malam, di Jalan Jalak, Taman Sri Bahtera, Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, telah melakukan kesalahan bunuh dengan menyebabkan kematian ke atas Konst. 114302 Rahim bin Manan, dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

At the conclusion of the trial on 30 September 1994 he was found guilty by the jury's unanimous verdict and he was convicted accordingly and sentenced to death.

The first and principal ground of the appellant was that the learned Judicial Commissioner failed to direct the jury adequately or at all on the differences between ss. 299 and 300 of the Penal Code. The learned Judicial Commissioner at p. 226 and 227 of the Appeal Record in his summing up read out verbatim the cases falling under s. 300.

The appellant's counsel further submitted that at p. 228 of the Appeal Record, the learned Judicial Commissioner then gave two examples that would amount to an act of murder within the definition of s. 300. The learned Judicial Commissioner then went on at pp. 228 and 229 of the Appeal Record to explain the "Definition" of culpable homicide not amounting to murder by listing out verbatim the exceptions in s. 300. The learned Judicial Commissioner made no attempt to explain to the jurors further that culpable homicide may not amount to murder:

(a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300 apply

and

(b) where the necessary degree of *mens rea* specified in s. 299 is present, but not the special degrees of *mens rea* referred to in s. 300, Penal Code.

The failure by the learned Judicial Commissioner, the appellant's counsel further submitted, to so render such an explanation had thus prejudiced the appellant, in that it led the jury to believe that unless the accused could rely on any of the exceptions in s. 300, he could not otherwise be found guilty of culpable homicide not amounting to murder.

Learned appellant's counsel cited the case of *Tham Kai Yau & Ors. v. Public Prosecutor* [1977] 1 MLJ 174 where the facts of the case are very different from our present appeal. At p. 176 of this cited case Raja Azlan Shah FJ (as he then was) said and I quote, with respect:

> A more difficult question that called for decision in this case was the offence of which the appellants should have been convicted. That was the other important ground of appeal, namely, that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted. In amplication of this ground of appeal we feel that it is the proper practice in cases of personal violence resulting in death for the judge to direct the jury on the right issue, in such a case as this, to arrive at a conclusion as to the degree of *mens rea* in the minds of the appellants. It cannot be disputed that intention is a matter of inference.

Speaking of this cited case what were the set of facts spoken there? What is clear in the facts of this cited case was the background of estranged relationship between the deceased and appellant. It is alleged by the prosecution that the appellant and one other made an attack with choppers and saw on the deceased. On that fatal day of the incident, it was not denied there was a fight, which resulted in the death of the deceased. Appellants one and two

had to go to the General Hospital for treatment, appellant three had a head injury and injury to an arm. In appellant four's house the police recovered the choppers used.

On the medical evidence, Raja Azlan Shah FJ commented thus and I quote:

> The pathologist testified that in his opinion the probable cause of death was multiple injuries leading to shock and haemorrhage. On the question whether the appellants intended to cause such bodily injuries as they knew to be likely to cause death or such as is sufficient in the ordinary course of nature to cause death, the medical witness should have been asked to give his opinion on the nature of the injuries and its likely and natural effects, but in this respect his evidence is silent.

From the sets of facts in the cited case there was therefore the evidence of sudden fight in which the jury ought to be directed for a possible verdict. Then there is the lacuna or want in the evidence of the pathologist to enable the jury to establish the appellants' intention.

If we compare the facts of the present appeal, with due respect to appellant's counsel, there is no similarity at all to the set of facts in the cited case.

Learned counsel for the appellant also cited the case of *Chung Kum Moey v. Public Prosecutor* [1967] 1 MLJ 205, where the facts of the case concerned the shooting of deceased shopkeeper in the course of a robbery and I respectfully quote the headnote of the case giving the facts and the judge's direction at the trial as follows:

> The appellant with two other men, entered a shop in Tanjong Katong Road, Singapore. He produced a revolver and told Chia Mui Song, its owner, to come out from behind the counter. Chia Mui Song did so and the appellant asked him for his keys and tried to search him. Chia Mui Song brushed his hands away and the appellant then fired a shot, in the direction of Chia Mui Song which hit him in the arm. After a struggle Chia Mui Song tried to get hold of the telephone which was on the counter behind which he had been sitting. The appellant fired again and Chia Mui Song died. Three bullets had struck his body and two on his right arm; one or both of these which went through his arm might have entered his body, but there was no evidence to that effect. The appellant was tried before a jury and the trial Judge in summing up, having explained the first, third and fourth limbs of s. 300 of the Penal Code, said: "If you take the same view as myself, you will decide that the injuries to the chest and abdomen were not intentionally inflicted by the accused ... the irresistible inference is that he had the knowledge that the act of shooting at the deceased's forearm was so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death ... It seems to me, therefore, that the prosecution has established beyond reasonable doubt one

> of the states of mind required for the offence of murder ... Your main task is, therefore, to decide whether you fully accept the evidence ... that it was the accused who fired the bullets which penetrated the deceased's chest and abdomen"; and just before the end of his summing up the learned trial judge said: "If you are fully satisfied on this point, that is, satisfied beyond reasonable doubt, you will find the accused guilty of murder." The appellant was convicted of murder and his conviction was upheld by the Federal Court (Barakbah CJ; Malaya, Wylie CJ; Borneo, and Tan Ah Tah J). (22 February 1965). By special leave in *forma pauperis* in an appeal to the Privy Council, the Privy Council allowed the appeal.

This cited case can be distinguished from our present appeal because Viscount Dilhorne in delivering the judgment of the Privy Council said at p. 208:

> On the simple facts of this case it might well be said that a reasonable jury properly directed would inevitably and without doubt have reached the conclusion that the person who fired the shots was guilty of murder. Their Lordships cannot, however, disregard the fact that the learned judge who heard the evidence formed the view that the accused's intention was **only to shoot the deceased in the forearm**. They are unable therefore to exclude the possibility that a reasonable jury properly directed would have reached the same conclusion, and, if it had, the possibility that it would not have concluded that the accused knew that the shots at the deceased's forearm were so imminently dangerous that they must in all probability cause death or such bodily injury as was likely to cause death or that the injury intended was sufficient in the ordinary course of nature to cause death. Their Lordships are therefore unable to apply the proviso.
>
> On any view of the evidence the appellant was guilty of culpable homicide.

At p. 226 of the Appeal Record in para. 12 the learned Judicial Commissioner said as follows and we set out that direction in para. 12 - para. 14:

> 12. Disisi undang-undang bukan semua kes yang menyebabkan kematian seseorang manusia disifatkan kesalahan membunuh. Misalnya, kematian itu boleh berlaku dengan tidak sengaja atau wajar dilakukan (justifiable homicide) dan oleh yang demikian, tiada apa-apa kesalahan dilakukan. Ada juga kematian yang jatuh di bawah definasi menyebabkan kematian dengan salah seperti yang ditakrifkan di bawah seksyen 299 Kanun Keseksaan dan di bawah kekecualian kepada seksyen 300 Kanun Keseksaan – dimana kesalahan tersebut dikenali sebagai "culpable homicide not amounting to murder".
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> 13. Seksyen 302 Kanun Keseksaan adalah seksyen bagi kesalahan membunuh orang. Apakah yang menjadi pembunuhan disisi undang-undang? Pembunuhan telah ditakrifkan dalam seksyen tertentu dalam Kanun Keseksaan. Biarlah saya jelaskan bahagian undang-undang tersebut dengan menyatakan bahawa mematikan seseorang dengan salah adalah suatu pembunuhan jika:

(1) Kematian itu dilakukan dengan niat hendak menyebabkan kematian, **atau**

(2) Sekiranya dilakukan dengan niat hendak menyebabkan sesuatu bencana atau kecederaan tubuh yang pesalah itu mengetahui mungkin menyebabkan kematian orang yang dikenakan bencana itu **atau**

(3) Sekiranya dilakukan dengan niat hendak menyebabkan bencana atau kecederaan tubuh kepada seseorang dan bencana kecederaan tubuh yang dimaksudkan hendak dikenakan itu adalah cukup pada lazimnya bagi menyebabkan kematian **atau**

(4) Sekiranya pesalah itu mengetahui bahawa perbuatan itu adalah sebegitu sekali berbahaya hingga mungkin sekali menyebabkan kematian, dan dia melakukan perbuatan itu dengan tiada apa-apa sebab bagi mendatangkan bahaya menyebabkan kematian atau bencana sebagaimana tersebut.

Misalnya:

(a) Jika A memancung leher B dengan tujuan menyebabkan kematian dan B mati akibatnya, A telah melakukan pembunuhan;

(b) A dengan sengaja melukakan B dengan pisau atau benda tajam dan luka itu pada lazimnya mencukupi untuk menyebabkan kematian dan B mati akibatnya. Disini A juga telah melakukan pembunuhan walaupun dia mungkin tidak berniat untuk menyebabkan kematian B.

14. Itulah dia 'ingredient' atau unsur-unsur yang diperlukan untuk melakukan pembunuhan disisi undang-undang. Sekarang biar saya terangkan pula definasi homisid salah tak terjumlah membunuh (culpable homicide not amounting to murder).

Perlu juga saya nyatakan,

disisi undang-undang, dalam beberapa keadaan tertentu, dimana menyebabkan kematian seseorang tidak menjadi suatu pembunuhan jika kematian itu dilakukan kerana:

(1) kebangkitan marah besar dan mengejut kepada pesalah (grave and sudden provocation) **atau**

(2) melebehi kuasa mempertahankan diri **atau**

(3) melebehi kuasa yang diberikan kepada kakitangan Kerajaan dalam menjalankan keadilan awam **atau**

(4) semasa pergaduhan mengejut atau perasaan panas hati (heat of passion)

(5) Jika simati yang berumur lebih dari 18 tahun mati atau mengambil risiko mati dengan kerelaan dirinya sendiri.

It is clear that the learned Judicial Commissioner's direction at that stage was a general statement of the law on what amounts to culpable homicide and what constitutes murder. He had not come to discuss the evidence on the case and applying the law to the set of facts.

The learned Judicial Commissioner then went to direct the jury on the ingredients of murder referring specifically to the case before the jury. At para. 15 at p. 229 of the Appeal Record, the Judicial Commissioner spoke of the burden of the prosecution to prove their case beyond reasonable doubt:

> 15. Sekarang mari kita lihat kes pendakwaan seperti yang telah dibentangkan di hadapan tuan-tuan dan puan-puan semua. Dalam kes ini adalah tanggungjawab pihak pendakwaan untuk membuktikan tiga unsur iaitu:
>
> (1) Bahawa Kons. 114302 RAHIM BIN MANAN telah mati dan beliau mati disebabkan kecederaan atau kecederaan-kecederaan yang dikenakan keatasnya;
>
> (2) Bahawa Tertuduhlah yang mengenakan kecederaan-kecederaan itu dan akibatnya Kons. RAHIM BIN MANAN telah mati; dan
>
> (3) Bahawa semasa mengenakan kecederaan atau kecederaan-kecederaan itu Tertuduh mempunyai niat hendak menyebabkan kematian atau mempunyai salah satu daripada niat atau pengetahuan yang saya sebutkan tadi sebagai 'ingredient' yang perlu untuk kesalahan membunuh.

Then the learned Judicial Commissioner went through the prosecution case. The prosecution had to prove the death of the deceased Constable 114302 Rahim bin Manan. It cannot be disputed he had died.

He continued, according to the evidence of Dr. Mohd. Shah bin Mahmood (SP24), from his post mortem, the deceased was shot at least twice which bullet landed on the body of the Constable. The injuries were as in the photos P4I, J, L, N, O, P and R.

SP24 continued in his evidence that the fatal shot was the shot which raptured the deceased's heart which was found as shown and marked as No. 6-5-4 on P94. SP24 said that shot could cause the death of deceased immediately (serta merta). Another fatal injury described as 10-9-2-1 in P94 but this injury did not cause instant death. According to SP24 the cause of death was the shot to the heart of the deceased.

The learned Judicial Commissioner posed the question at p. 231 of the Appeal Record, did the accused cause the injuries as described by Dr. Mohd. Shah to the deceased Constable Rahim bin Manan?

The answer is in the evidence of two witnesses who saw the accused shot Constable Rahim. The evidence of Constable Mohd. Taipor bin Shaharom (SP19) was that he was together with the deceased and L/Kpl. Ghazali (SP21) while they were conducting 'spot check' at the place of the incident at Jalan Jalak, Taman Seri Bahtera, Cheras, Kuala Lumpur on 26 December 1992 at about 12.05am. SP19 stood about 3-4 feet from L/Kpl.Ghazali and the deceased.

SP19 continued his evidence clearly and lucidly (jelas) and he stated that he saw L/Kpl. Ghazali stopped a red car, Ford Laser (P87) and he directed the car to stop at the side of the road. L/Kpl. Ghazali was taking the particulars of the four passengers in the car who all came out of the said car.

SP19 then saw L/Kpl. Ghazali proceeded to his motorcycle followed by one of the four people and also Constable Rahim. When Constable Rahim had taken a file from L/Kpl. Ghazali's motorcycle they then returned to the said car where the three people were on the right side of the said car.

After that when L/Kpl. Ghazali opened the front door driver's side and he stooped with half his body in the said car to examine the said car, then at that time one of the four earlier walked by himself to the rear left door of the said car. That person opened the rear left door and he took out a M.16 gun and immediately shot Constable Rahim and after that he shot at L/Corporal Ghazali. The person who shot them went to move (menguis-guis) the body of L/Kpl. Ghazali who had fallen on the road and then he went to inspect Constable Rahim.

At this time the person who shot tried to re-enter his car while holding the M.16 gun and at this time Constable Taipor shot that person with his 0.38 revolver and the shot cut the chin and neck of that person. The person who was shot then fell down and Constable Taipor handcuffed that person, and that person was the accused.

The evidence of SP19 was fully supported by L/Const. Ghazali (SP21) from the time they commenced the spot check to the time they were shot.

The chemist (SP17) testified that the bullet fragments (P76A) which were extracted from Constable Rahim could not have come from the revolver 0.38 special. The learned Judicial Commissioner then left it to the jury to make their finding of fact which was that the death of Constable Rahim was as a result of his injuries and the injuries were as a result of him being shot with the M.16 rifle and it was the accused who shot him.

The learned Judicial Commissioner came to the next most important part of his direction to the jury which was the poser – did the accused have the intention to murder the deceased? We can do no better then to quote para. 23 and para. 24 of his summing up:

> **23. Adakah Tertuduh mempunyai niat membunuh?**
>
> Sekiranya tuan-tuan dan puan-puan mendapati Tertuduhlah orang yang menembak dan menyebabkan kecederaan yang membawa maut kepada Kons. Rahim perlu pula tuan-tuan dan puan-puan menimbangkan perkara samada Tertuduh semasa menyebabkan kecederaan kepada simati itu mempunyai niat hendak menyebabkan kematian atau mempunyai salah satu daripada niat atau pengetahuan yang saya sebutkan tadi sebagai salah satu unsur yang diperlukan untuk membuktikan berlakunya pembunuhan dalam kes ini.
>
> 24. Niat seseorang itu hanya dapat dilihat daripada tingkah lakunya. Dr. Mohd. Shah (SP24) dalam keterangannya menyatakan tembakan yang memecahkan jantung simati boleh menyebabkan kematian serta merta. Juga, kecederaan tembakan yang terdapat pada simati adalah mencukupi pada kebiasaannya untuk menyebabkan kematian. Begitu juga keterangan SP7 ASP Wan Hashim, pegawai persenjataan Ibu Pejabat Kontinjen Kuala Lumpur menyatakan effective range M.16 ialah 450 meter iaitu jarak tembakan yang boleh membawa maut. Keterangan SP19 dan SP21 pula mengatakan Tertuduh berada disebelah kiri pintu belakang kereta manakala Kons. Rahim berada di sebelah kanan belakang kereta – sudah tentu jarak antara mereka berdua dekat sahaja apabila Kons. Rahim ditembak. Kita juga telah melihat demonstrasi dikereta yang dibuat oleh SP19 tentang cara tembakan itu berlaku. Berdasarkan keterangan-keterangan ini saya berpendapat adalah jelas tembakan daripada senjata yang mempunyai kuasa velocity yang tinggi seperti M.16 itu dari jarak yang begitu dekat sudah tentu akan membawa maut kepada mangsanya. Terpulanglah kepada tuan-tuan dan puan-puan untuk membuat kesimpulan mengenai hal ini. Keterangan juga menunjukkan bahawa Tertuduh adalah seorang bekas komando tentera yang sudah tahu selok belok senjata M.16 kerana dia telah menjalani dan lulus kursus komando.

While leaving it to the jury to answer the question, the learned Judicial Commissioner gave an opinion that it was clear that a shot from a weapon of a high velocity as M.16 from a close range must result in death to the victim and the accused must have intended such result. The weapon is even more potent in the hand of such a person as the accused who had been trained and had served as a commando.

On this main ground of appellant's appeal that the learned Judicial Commissioner did not fully explained the distinction between s. 300 and s. 299 and the learned Judicial Commissioner's failure to explain that the accused could be guilty of a lesser offence of homicide not amounting to murder, we find there is no merit. After having considered the learned Judicial Commissioner's direction we are unable to find anything wanting and if we may say so, with respect, it was impeccable.

In the case of *Tham Kai Yau & Ors. v. Public Prosecutor* [1977] 1 MLJ 175 referred above Raja Azlan Shah FJ (as he then was) at p. 176 referred to the error of the judge's direction in the ground of appeal:

> ... that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted.

We failed to find any set of facts favourable to the accused that should weigh on the learned Judicial Commissioner to direct the jury that the accused could be guilty of homicide not amounting to murder or any lesser offence.

We have considered the submission of the learned counsel for the appellant and we find it is correct from the facts, as adduced by the prosecution in this trial, that the accused inflicted the injury to deceased's heart causing instantaneous death and the accused's defence that he did not shoot the deceased but it was somebody else who did justified the learned Judicial Commissioner leaving it to the jury to find the intention of the accused and such intention was to commit murder or nothing else. We are satisfied the jury gave an answer after having been directed fully and clearly by the learned Judicial Commissioner that the accused did shoot with the required intention to kill and they unanimously held he committed murder.

The next ground of appeal of the appellant was the Judicial Commissioner's direction at para. 33 at p. 241 of the Appeal Record. We quote:

> 33. Walaupun Peguambela berhujah kemungkinan besar Kons. Rahim telah keluarkan pistolnya dan jika hal ini diterima sekalipun ini tidak mencukupi untuk menimbulkan provokasi yang amat besar dan mengejut. Tambah lagi tiada keterangan yang menyatakan pistol revolver Kons. Rahim telah diguna untuk menembak pada masa kejadian itu. Dengan itu terserahlah kepada tuan-tuan dan puan-puan untuk membuat pendapat dan keputusan sewajarnya.

Learned counsel complained that the learned Judicial Commissioner should have left it to the jury to find any fact of provocation. He said in the evidence adduced before him there is no suggestion that Constable Rahim pointed his pistol at anytime before he was shot.

We were of the view, assuming Constable Rahim had pointed his pistol at the accused, that cannot at anytime be interpreted as provocation as justifying the accused to use the illegal M.16 he had to kill him. The learned counsel for the appellant did not proceed to pursue this line of argument further.

In reply the learned Deputy Public Prosecutor submitted to us that there was no misdirection by the learned Judicial Commissioner. We agree with his submission that, on the evidence adduced, there was only one direction to give to the jury and it was either murder or nothing else and the jury duly arrived at a verdict that it was murder. We ourselves were satisfied that the direction to the jury was correct and there was no miscarriage of justice. We therefore dismiss the appeal and confirm the sentence passed.